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# Supreme Court of the United States.

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OCTOBER TERM, 1906.

No. 121.

THE NORTHERN LUMBER COMPANY,
*Appellant,*

vs.

WILLIAM O'BRIEN, ALBERT J LAMMERS, GEORGE A. LAMMERS AND MARY E. COFFIN.

APPELLANT'S BRIEF.

CHARLES W. BUNN,
JAMES B. KERR.

THE NORTHERN LUMBER COMPANY,
*Appellant*,

vs.

WILLIAM O'BRIEN, ALBERT J. LAMMERS, GEORGE A. LAMMERS AND MARY E. COFFIN.

STATEMENT.

This is an appeal from a decree of the Circuit Court of Appeals of the Eighth Circuit affirming a decree of the Circuit Court for Minnesota dismissing the appellant's bill of complaint. The bill alleges ownership in the appellant of the timber upon a parcel of land in Minnesota through mean conveyances from the receivers of the Northern Pacific Railroad Company, the corporation chartered by Congress in the act of July 2, 1864 (Transcript, p. 5).

The facts are stipulated (Transcript, pp. 23 to 34) and it appears from the stipulation:

By the act of July 2, 1864, Congress granted to the Northern Pacific Railroad Company:

> "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad

ing by the grant) (Transcript, pp. 30 to 33), and has allowed a selection to be made by Mary E. Coffin under the forest reserve indemnity act of June 4, 1897 (Transcript, p. 33).

The lands are vacant and appellees, claiming under the said selection, intend to cut and remove the timber (Transcript, p. 34).

By supplemental bill and answer it appears that upon Nov. 16, 1903, after the bill was filed, a patent was issued to the Appellee Coffin.

## Assignment of Errors.

1. The court erred in holding that the lands in controversy were not public lands of the United States on July 2, 1864, within the meaning of the act of Congress approved on that date granting lands to the Northern Pacific Railroad Company.

2. The court erred in dismissing appellant's bill of complaint.

## Argument.

The simple question is, whether by the withdrawal upon general route in favor of the Lake Superior and Mississippi Company these lands ceased to be *public lands* within a grant of Congress made while the withdrawal was effective, which grant described *every* odd section of public land not reserved, granted, etc., *when the line de-*

*scribed in the grant should be definitely located.* The lands in suit were not reserved or granted and were free from claims when the line of the Northern Pacific was definitely located. But it is insisted that they were not *public lands* at the *date of the act of Congress;* and that they were taken out of that class of lands because then withdrawn from settlement in the interest of the Lake Superior and Mississippi Company.

The words "not reserved, granted or otherwise appropriated and free from pre-emption, or other claims or rights" in the Northern Pacific grant refer to the definite location *only.* Congress saw fit not to use these words when defining what lands should *at the date of the grant* come under its terms. Of those lands the only description in the act is "public lands" without more. Though the words "not reserved," etc., were *not* used in describing the lands covered at the date of the grant, and *were* used in describing those to be finally included at definite location, the decision below interpolates the words into that clause of the act from which Congress carefully omitted them.

The withdrawal upon general route for the Lake Superior and Mississippi Company having been set aside in September, 1866, the lands were free public lands when the Northern Pacific line was definitely located July 6, 1882; and they therefore fall literally within the Northern Pacific grant, unless their withdrawal was such as to forbid their inclusion on July 2, 1864, the date of the granting act, within the term "public lands" as used in that act.

(A) To a withdrawal precision and certainty are as necessary as to a conveyance. The particular lands withdrawn must be *certain* or *capable of being made certain*. The local officers have no authority to make withdrawals, which must rest for their validity upon an order of the Secretary or of the Commissioner of the General Land office. The withdrawal in this case of "a body of lands *about* twenty miles in width" was wholly indefinite and uncertain. It was not helped out by the map of general route transmitted with the withdrawal order to the local land office, because that map was wholly indefinite and uncertain, all of which is well pointed out in the Commissioner's letter of March 19, 1901 (Transcript, p. 28). We submit moreover that the same implication will be found in the Lake Superior and Mississippi grant invalidating any reservation before *definite location* which in *Hewitt v. Schultz*, 180 U. S. 139, was held to have that effect under the Northern Pacific grant. The two grants are not to be distinguished in this respect. The Lake Superior and Mississippi grant says (sec. 3): "And be it further enacted, *that when the said road shall be definitely located*, and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption or private entry adverse to this grant."

It is as clear by one act as the other (a) that no lands were to pass which prior to definite location had been otherwise appropriated or disposed of; (b) that the government's power of disposition was

not to be cut off by the mere passage of the granting act; (c) that the country was to remain open to settlement under the pre-emption and homestead laws until definite location.

(B) But conceding for argument's sake that the withdrawal was effective, we submit that it did not shield the lands from the operation of the subsequent grant to the Northern Pacific and did not deprive them of their character as public lands within the meaning of the Northern Pacific act.

The only requirement of the Northern Pacific grant relating to or defining the lands which *at its date* were embraced by the act of Congress being that they should be "public lands," the question is whether a reservation from pre-emption entry upon *general route* of another railway forbids their inclusion under that term.

There is a broad distinction between a reservation upon *general route* and one upon *definite location*, which latter sort of reservation the court considered in *Northern Pacific Railroad Company v. Musser-Sauntry Co.*, 168 U. S. 604. A reservation upon definite location is of indemnity land necessary (or supposed necessary) to fill losses in place limits. It is essential in order to save vested rights, not only as against entries under the land laws, but as against subsequent Congressional grants. The reservation upon general route involved in this case was, upon the contrary, not one

to protect or save rights. It was merely to facilitate the operations of the public land department. It covered only *place lands* and those needed no protection from subsequent disposal by Congress, the settled doctrine being that priority of grant gives priority of right. If they had been pre-empted the indemnity provisions of the act would have operated. The only effect and purpose of the withdrawal was therefore to save place lands from pre-emption so that it should not be necessary to select and adjust indemnity. Not only did no right attach to the lands by the withdrawal, but no claim was thereby asserted against them, and they were in no sense "appropriated" to the prior grant. See opinion in the *Musser-Sauntry* case, pp. 608-9. They did not cease thereby to be public lands within the disposal of Congress, and fairly included by an act conveying the public lands without reservation or exception.

The effect of withdrawal of public lands from pre-emption based upon *general location* of a railroad route has been repeatedly defined by this court. It is settled by the decisions, as we understand, that *such* a withdrawal does not segregate the land from the public domain so as to exempt it from later legislative grants. In other words, a so-called general route withdrawal is not withdrawal from or as against legislative control and disposition.

This was the point decided in *Northern Pacific Railroad Company v. Sanders*, 166 U. S. 620, involving a controversy over land which after with-

drawal as place land for the Northern Pacific grant upon general route, was filed upon as mineral land under an act of Congress of July 26, 1866, relative to the disposition of mineral lands. The mineral land act was later than the railroad grant and the filing under it later than the withdrawal under the railroad grant. The decision against the Railroad Company was squarely grounded by the court upon the principle that neither by location upon general route, nor by departmental withdrawal in pursuance of it, nor by anything short of definite location does a railroad company acquire such an interest even in its place lands as to prevent later granting acts of Congress attaching to them. The court said:

> "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by congress, and no right attached to any specific section until the road was definitely located and a map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the *public lands* on the general route of the road as it saw proper."

So in *Menotti v. Dillon*, 167 U. S. 703, under an act providing "that in all cases where the State of California has heretofore made selections of any portion of the *public domain* in part satisfaction of any grant made to said State, by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State," it was held that selections by the State of lands which

had been previously withdrawn, for the benefit of a railroad company which had filed its map of *general* route, were selections from the "*public domain*" within the meaning of the above quoted act, and passed as such to the State of California under the provisions of said act notwithstanding such withdrawal. The court said:

> "No exception is made of lands which, at the date of the passage of the act, were withdrawn from pre-emption, private entry and sale, pursuant to the filing by the railroad company of its map of *general* route, and the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that Congress had no power to confirm to the State lands which, at the time, were simply withdrawn from pre-emption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands, in aid of the construction of a railroad, is, until its route is established, in the nature of 'a float,' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the pos-

> sibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated."

The same principle was involved in the recent cases of *United States v. Oregon & Cal. R. R. Co.*, 176 U. S. 28, and *Wilcox v. Eastern Oregon Co.*, 176 U. S. 51, which should be regarded as controlling and decisive of this appeal. The decision in *Nelson v. Northern Pacific Railway Co.*, 188 U. S. 108, that upon a correct construction of the Northern Pacific act there was no *legislative withdrawal* upon location of general route, does not detract from these decisions, for both the court in its opinion in the *Nelson* case and the dissenting justices in their opinion took occasion to reiterate the doctrine of the *Sanders*, *Menotti* and *Oregon Company* cases, that through nothing short of definite location will the rights of a railroad company so attach as to shield the land from the operation of a subsequent legislative grant.

So, in the earlier case of *Kansas Pacific R. R. Co. v. Atchison, etc., Co.*, 112 U. S. 414, it was held that lands passed to the Kansas Pacific Company under an act of July 2, 1864, although they had been withdrawn by order of the department in March, 1863, for the benefit of a grant to the Atchison Company, and as lying along its "*probable lines.*" The court said (p. 422):

> "The order of withdrawal of lands along the '*probable lines*' of the defendant's road, made on the 19th of March, 1863, by the Com-

> missioner of the General Land Office, affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant."

The cases in which withdrawals of land for the benefit of railroad companies have been held to exempt the land from the operation of subsequent legislative dispositions of public domain, are all instances of withdrawal upon definite location.

Thus, in *Northern Pacific Railroad Co. v. Musser-Sauntry Co.*, 168 U. S. 694, it is held that lands lying within the indemnity limits of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and withdrawn for its benefit by order of the department, in pursuance of a map of definite location of that road, were thereby so segregated from the public domain as not to pass under a subsequent grant to the Northern Pacific Company.

Of the three cases cited by the court in its opinion, as holding that such is the effect of a withdrawal as against subsequent railroad grants, the third, *Spencer v. McDougal*, 159 U. S. 62, involved only the question of the effect of a withdrawal as against a subsequent pre-emption entry, no subsequent legislative disposition being involved.

In the other two cases, *St. Paul & Pacific R. Co. v. Northern Pacific Railroad Co.*, 139 U. S. 1, and *Wisconsin Central Railroad Co. v. Forsythe*, 159 U. S. 46, the withdrawals, like that in the *Musser-Sauntry* case, were based upon definite locations. See 139 U. S. 17; 159 U. S. 49.

The same was true in *Lake Superior Co. v. Cun-*

*ningham*, 155 U. S. 354, 373, 375, where, as in the *Musser-Sauntry* case, definite location was emphasized as the basis of the decision.

There are to be found in the decisions of this court, a few general statements to the effect that only those lands are a part of the public domain within the meaning of railroad land grant acts, which are open to entry under the general land laws. Expressions of this kind, while not objectionable when read in connection with the particular circumstances inducing them, are misleading when severed from those connections. In every instance where such expressions occur, the withdrawal in question will be found to have been made for the protection of what *might prove to have become an actually vested right to the specific tracts withdrawn*. Between withdrawals of that character, and those which, without any assumption of a possibly vested right to the specific parcels withdrawn, are made merely as a matter of accommodation, in order that the rights of the party in whose interest the withdrawal is made, *may have opportunity to attach* to the withdrawn lands, the distinction is fundamental. The presumption is, that in its subsequent dispositions of the public domain, it is the intention of Congress to respect withdrawals of the former class, and to ignore those of the latter class. This unquestionably is the distinction which underlies and justifies the above mentioned and well established judicial discrimination between withdrawals on definite location, and those made upon maps of general route.

For upon the definite location of any railroad having a grant of place and indemnity lands, it becomes a matter of uncertainty whether all of the then available lands within the indemnity limits, may not be necessary to supply the deficiency of place lands. If such should ultimately prove to have been the fact, then in a very true sense, the railroad company may be said to have had, from the date of definite location a vested right to *all* of the public lands within the indemnity limits. *St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad Co.*, 139 U. S. 1, 18-19.

But with respect to a withdrawal of place lands upon location of general route only, the situation is different. Such a location imposes no restraint upon the ultimate adoption of any route which might originally have been selected. The route may at the option of the company be so shifted as to affect few, if any, of the lands indicated by the general location. While it is true that it may turn out, upon definite location and construction, that some of the lands covered by a general route withdrawal, ultimately inure to the company, with the title relating back to the date of the grant, it is none the less true that the mere location of the general route cannot in any possible contingency operate to presently invest the company with an interest in the specific parcels of lands, which according to the indications of the general location, are likely to fall within the limits of the grant. A withdrawal of such lands is not for the protection of any interest which it is supposed may have al-

ready actually vested in the specific parcels withdrawn, but is a mere matter of gratuitous accommodation, in anticipation that the interests of the company may ultimately attach to such lands. It is therefore, not an appropriate or sufficient ground for impairing or intercepting the operation of later legislative grants.

In order to show how deeply rooted this distinction is in the law, and how consistently it has been applied in the cases, we add the following review of all the other decisions of this court bearing upon the extent to which lands are segregated from the public domain by either legislative or departmental withdrawals.

To the general doctrine that land to which there has attached either a vested private right or a permanent public use, is thereby segregated from the mass of lands held by the government for distribution through grants and entries, there is another which stands toward it somewhat in the relation of a corollary, to-wit: that where it is a matter of *doubt* whether as to a given tract of land, such a private right or public use has *actually attached*, it is appropriate that the land, the status of which is in doubt, should be withdrawn until the true status of the tract can be authoritatively determined. Within this class fall the cases of *Newhall v. Sanger*, 92 U. S. 761, 764-765; *Doolan v. Carr*, 125 U. S. 618, and *Cameron v. U. S.*, 148 U. S. 301, which determine only that the tenor of legislation was such as to evince an intention on the part of Congress to segregate from the public do-

main and from the operation of public land laws and grants, lands claimed under grants made by the Mexican government, until such claims had been adjudicated in the manner provided by Congress; and that as a consequence, lands so claimed under a Mexican grant and still *sub judice* at the date of an alleged grant or entry thereof, were not to be deemed at such date and under such circumstances open to disposition as a part of the public domain.*

To the same class belong such cases as *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629; *Sioux City, etc., Co. v. Griffey*, 143 U. S. 32; *Hastings and Dakota R. R. Co. v. Whitney*, 132 U. S. 357; *Bardon v. N. P. R. R. Co.*, 145 U. S. 535, and *Whitney v. Taylor*, 158 U. S. 85, which merely apply the rules, that a railroad grant will not carry land upon which at the date of the railroad grant, a pre-emptioner appears by the public records to have acquired rights; and that inasmuch as a grant *in praesenti* should be construed as having reference only to lands over which the government has presently a power of disposition (146 U. S. 594), it will not carry lands appropriated at the date of the grant, even though they may afterwards fall back into the public domain. It is held not material whether the existing filing, claim or entry, is valid or invald; it being enough that its

*United States v. McLaughlin*, 127 U. S. 428, 454 to 456, contains an important qualification of *Newhall v. Sanger*, namely, that a reservation of a larger territory to satisfy a mere floating grant does not except the territory from the operation of subsequent Congressional grants so long as sufficient land is left to satisfy the float

validity is by the department either recognized or *sub judice*, since in such a case the government must keep itself in position to recognize and respect the right which is claimed to have become vested, if it should ultimately be found entitled to prevail.

The rationale of this rule in its relation to private rights undoubtedly is, as has been repeatedly declared by the courts, that sound public policy requires the government to deal directly, and unimpeded by extraneous influences, with persons claiming to have acquired vested rights in the public domain, and not to raise up an army of interlopers to come in between the government and the claimants of its lands.

In *Wolcott v. Des Moines Co.*, 5 Wall. 681, and *Williams v. Baker*, 17 Wall. 144, there had been granted to the State of Iowa, to aid in the improvement of the Des Moines river, the alternate sections in a strip five miles in width on either side of the river. The act was in terms of present grant with express provision that the lands should become the property of the state upon her admission into the Union, which was to occur in the immediate future (23 How. 84). A doubt having arisen as to whether the grant should extend along the full length of the river from the south to the north boundary of the state, or only as far north as the mouth of Raccoon Fork, the lands throughout the entire length of the grant as claimed by the state were, by departmental order, reserved

from sale, to abide the final determination of the controversy. It was held that the lands thus withdrawn were "reserved to the United States by competent authority" within the meaning of provisos contained in subsequent railroad land grants, and were therefore not affected by such grants. *It will be observed that in this case the claim of the state was that it had actually become the owner of these lands*, and the principle of the decision is that, where a withdrawal is made for the protection of an alleged vested right which, if valid, will be good against the world, the withdrawal is to be deemed a reservation from all forms of disposition, whether legislative or otherwise.

To the same effect substantially is the decision in *Wolsey v. Chapman*, 101 U. S. 755, in which the withdrawal or reservation of lands under the Des Moines river improvement grant was held to protect the withdrawn lands from selection under a prior floating grant to the state for purposes of internal improvement.

The case of *Wolcott v. Des Moines* and the other cases relating to the Des Moines river grant have, moreover, no bearing upon this case for another reason, viz.: the subsequent railroad grant involved in those cases contained the following proviso:

> "That any and all lands *heretofore* reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby

reserved to the United States from the operation of this act."

In the Northern Pacific grant there was, as above pointed out, no qualification whatever to the term "public land." The distinction here made applies also to the case of *Railroad Company v. United States*, 92 U. S. 733.

So far as pre-emption and homestead entries, etc., are concerned, there seems to be no limit to the power or discretion of the department to suspend the privilege of making such entries in any particular land district, or to withdraw lands from such entry. Hence, when an order of that kind is made, it is unnecessary to inquire whether made upon general location or definite location or merely in anticipation of the passage of a land grant act, or indeed whether there is any adequate reason for the withdrawal. The power of the department seems to be absolute and unqualified in the premises.

It was only as against such homestead or pre-emption entries that the withdrawals were held operative in *Bullard v. Des Moines R. R. Co.*, 122 U. S. 167, and *Hamblin v. Western Land Co.*, 147 U. S. 531, and *Spencer v. McDougal*, 159 U. S. 62.

Upon the whole, therefore, the following propositions appear to be well grounded in reason and in the decisions of this court:

(a) That a withdrawal either legislative or departmental, while operating to preclude private

entries may be inoperative as against subsequent legislative grants.

(b) That only those withdrawals are effective as against subsequent legislative grants which are made for the protection of possibly vested rights.

(c) That the last mentioned class of withdrawals includes those made upon definite location, but does not include those made upon general route.

CHARLES W. BUNN,
JAMES B. KERR.